IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 13 Case Number 90-10450
BRENDA LEE BROWN	)	
Debtor	)	
CTE INVESTMENTS, INC.	)	
Movant	)	Filed at 5 O'clock & 49 min PM
vs.	)	Date: 7-26-90
BRENDA LEE BROWN	)	
Respondent	)	

ORDER

CTE Investments, Inc. (hereinafter "CTE") requests an order relieving it from the automatic stay of 11 U.S.C. §362(a) and allowing it to proceed with recovery of property in the possession of Brenda Lee Brown, debtor in this Chapter 13 proceeding (hereinafter "debtor") in which CTE claims an interest. From the evidence presented at hearing and briefs submitted by counsel for CTE[1] this court makes the following findings of fact and conclusions of law in determining that relief from stay and dismissal are appropriate.

The dispute between the debtor and CTE involves three (3)

[1] Debtor's counsel chose not to submit a brief.

written contracts between the parties. By agreement dated February 26, 1990 the debtor entered into a written agreement entitled "Georgia Lease-Purchase Agreement" with CTE doing business as Curtis Mathes Home Entertainment Center. In the agreement, the debtor purportedly leased one (1) Curtis Mathes audio system model CE3125 with serial No. 13091309 and two (2) Curtis Mathes "speakers rack" model No. CS31250 with serial Nos. 23291069 and 33291335. The term of the agreement was for 104 weeks with a weekly payment of Seventeen and 97/100 ($17.97) Dollars. The agreement provided in paragraph 17: "LESSEE'S RIGHT TO TERMINATE: You, at your option may terminate this Agreement at any time, without further obligation or penalty, by returning the leased property in its present condition, normal wear and tear accepted, and by paying all lease payments you owe through the date of return." The agreement further provided at paragraph 11: "PURCHASE OPTION: A. We will transfer ownership of the lease property to you, when you, at your sole election, choose to renew this lease for 104 successive weekly lease terms or 52 successive bi-weekly lease terms or 24 successive monthly lease terms. B. You may purchase the leased property under this contract during the lease term for the fair market value minus 35% of all the periodic payments made." By separate agreement, also dated February 26, 1990, the debtor purportedly leased one (1) GE freezer model No. CA1ODLRWH with serial No. RA163009 for a term of 104 weeks at a weekly payment rate of Ten and 55/100 ($10.55) Dollars. By agreement dated March 3, 1990 the debtor entered into third purported lease agreement with CTE for one (l) GE washer model No. WWa7010Gwh with serial No. AD145890G for a term of 104 weeks at a weekly payment of Eleven and 61/100 ($11.61) Dollars. All other above referenced terms were the same in each agreement. The debtor executed and filed her petition for relief under Chapter 13 on March 16, 1990.

The debtor contends that her Chapter 13 proceeding was filed as a result of her getting behind in payments on her Chevrolet GEO automobile. The debtor purchased her automobile in March, 1989. According to the debtor, she changed jobs in October, 1989 which resulted in less net income to her household. In December, 1989 she fell behind in her payments on the automobile. The lender secured by the automobile refused to accept partial payments resulting in her being three (3) payments in arrears as of the date of filing. Under cross-examination the debtor admitted that she was in financial trouble when she entered into the contracts with CTE. The debtor's schedules filed in this case reveals her total disposable income at Four Hundred Eighty-One and No/100 ($481.00) Dollars per month. Her very modest living expense budget requires Four Hundred Ninety-One and No/100 ($491.00) Dollars per month. The deficiency between income and expense and her projected plan payment of Two Hundred Seventy-Five and No/100 ($275.00) Dollars are to be made by "voluntary" contributions from her brother. The debtor's schedules of property list two motor vehicles, a 1989 Chevrolet S-10 pickup truck and 1989 Chevrolet GEO. According to her testimony, she

bought and financed the truck for her brother and his "voluntary" monthly contribution to her of Two Hundred Eighty-Six and No/100 ($286.00) Dollars is the regular monthly payment on the truck.

Under the debtor's proposed plan CTE, identified as Curtis Mathes, is treated as a secured creditor to be paid in full from distributions made by the Chapter 13 trustee from the monthly debtor plan payments of Two Hundred Seventy-Five and No/100 ($275.00) Dollars over 60 months.

CTE asserts two grounds from relief from stay under 11 U.S.C. §362(d)(1).[2] According to the theories of CTE the debtor's proposed plan fails to provide adequate protection of CTE's interest in property because the agreements with the debtor are true leases as defined under Official Code of Georgia Annotated (O.C.G.A.) §10-1-680 et seq. As true leases, the debtor must either assume or reject the leases. See, 11 U.S.C. §365[3]. If assumed, the debtor

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[2] 11 U.S.C. 362(d)(1) provides:

> On request of a party in interest and after notice and a heari the court shall grant relief from the stay provided under subsection (a) of this section [362], such as by terminating, annulling, modifying, or conditioning such stay
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

[3] 11 U.S.C. §365(a) and (b) provides:

> (a) Except as provided under §765 and 766 of this title [11] in subsections (b), (c) and (d) of this section [365], the trustee, subject to the court's approval, may assume or reject

must perform in accordance with the terms of the lease, that is, make the weekly lease payments directly to the creditor in accordance with §365. Alternatively, CTE contends that the contracts in question were entered into at such time when the debtor was experiencing a financial hardship, that the debtor did not intend to repay the agreements according to their terms, and that the agreements were entered into on the eve of this Chapter 13 filing with the intent to restructure the payments through her Chapter 13 plan. This scheme constitutes a bad faith filing establishing a "for cause" basis for relief from stay.

As to the lack of adequate protection assertion by CTE, the issue is whether the lease to purchase agreement is a "true lease" triggering the provisions of 11 U.S.C. §365, or whether it is a disguise security agreement and conditional sales contract or

lease intended for security subjecting the claim of CTE to 11

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any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in the executory contract unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee

(A) cures, or provides adequate assurance that the trust will promptly cure such default;

(B) compensate or provides adequate assurance that trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

U.S.C. §1322(a)(2) which permits modification of the rights of holders of secured claims. The resolution of this contention for relief is controlled by a decision of this court in Rent City v. Hollis (In re: Hollis Chapter 13 Case No. 89-10179) (Bankr. S.D. Ga. Dec. 12, 1989) (appeal dismissed for lack of prosecution) American Leasing, Inc. d/b/a Rent City vs. Hollis, Case No. CV-190-016 (S.D. Ga., March 15, 1990).

> For purposes of bankruptcy, the term security agreement is defined as an agreement that creates or provides for a security interest. 11 U.S.C. §101(44). Whether a lease constitutes a security interest in bankruptcy depends upon whether the lease constitutes a security interest under applicable State or local law. See, H.R. Rep. No. 595, 95th Cong., 1st. Sess. 314 1977. In this case, the debtor is a resident of . . . Georgia and [CTE] does business in [Georgia]. The transaction in question was entered into in the State of Georgia and is subject to Georgia law. The legislature of the State of Georgia has seen fit to enact the Georgia Lease-Purchase Agreement Act which became effective July 1, 1987. [O.C.G.A. §10-1-680 et seq.] The Georgia Lease Purchase Agreement Act provides in part as follows:
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>> "Lease-Purchase Agreement" means an agreement for the use of personal property by a lessee primarily for personal, family, or household purposes for an initial period of four months or less, that is renewable with each payment after the initial period and that permits the lessee to become the owner of the property. Lease-Purchase agreement shall not include any of the following:
>> (A) A lease or agreement which constitutes a credit sale as defined in 12 CFR 22.6(a)(16) and Section 1602(g) of the Truth-in-Lending Act, 15 U.S.C. §1601
>>
>> et seq.; . . .

> (E) A lease or agreement which constitutes a retail installment transaction as defined in paragraph 10 of section (a) of Code Section 10-1-2. O.C.G.A. 10-1-681.
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> By this definition, the Legislature of the State of Georgia clearly intends to distinguish those transactions that meet this definition from traditional credit sales transactions which are the essence of leases intended for security. Whether the agreement in question is a true lease or lease intended for security must be determined in light of this definition.

In re: Hollis, supra slip op. pp. 4-5.

In the present case, the agreements in issue fail to meet this definition of a lease-purchase agreement in that the initial period of the lease exceeds four months. According to each contract the term of the lease is 104 weeks. The contract affords the debtor an opportunity for early termination, but this-does not comply with the requirements of the Georgia Code which requires that the agreement be for an initial term of four months, or less and renewable with each payment after the initial period.

> The Georgia Legislature has seen fit to define what constitutes a lease-to-own agreement and to identify such agreement meeting that definition as a true lease and not a lease intended for security.
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> Decisions rendered after enactment of O.C.G.A. §10-1-680 et seq. involving consumer leasepurchase agreements are based at least in part on a determination that the agreement in question in each case was a true lease because of compliance with the definitional provision. In re: Smith Chapter

13 Case No. 88-41281 slip op. p. 6 (Bankr. S.D. Ga. June 23, 1989) (Davis, J.); In re: Huffman, 63 B.R. 737, 739 (Bankr. N.D. Ga. 1986) In re: Williams, Chpt. 13 Case No. 88-11150 at p. 2 (Bankr. S.D. Ga. filed July 14, 1989) (Dalis, J.).

> In the area of consumer personal property leasepurchase agreements the Georgia Legislature has seen fit to set forth minimum requirements for such agreements. In this instance, the Georgia Code requirement that the agreement be [for an initial period of four months or less and renewable with each payment after the initial period is] stricter than the requirements under prior judicial decisions. See, In re: Wood, 7 B.R. 543 (Bankr. N.D. Ga. 1980) [footnote omitted]. A legislature may change a principle of law and abrogate decisions made thereunder where in the opinion of the legislature it is necessary for the public welfare. Baumann v. Surha 145 F.Supp. 617 (1956), aff'd 352 U.S. 863, 775 S.Ct. 96, 1 L.Ed. 2d 73 (1956); U.S. v. United Shoe Machinery Co., 264 F. 138, 151 (E.D. Mo. 1920), aff'd 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708 (1922); Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929); Georgia Lions Eye Bank v. Lavant, 255 Ga. 60, 335 S.E.2d. 127 (1985).
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> The Georgia legislature has established that in consumer transactions, in order for an agreement to lease personal property which offers the lessee the opportunity to obtain ownership of the property to be a true lease rather than a lease intended for security, the agreement must comply with O.C.G.A. §10-1-680 et seq. In this case the contract failed that basic requirement. While mere compliance with O.C.G.A. 10-1-680 et seq. does not preclude judicial review of an agreement, initially any inquiry in this area must determine if the agreement complies with applicable state law provisions. As the Georgia legislature has seen fit to define a true lease in a consumer personal property transaction, failure to meet that definition removes the agreement from consideration as a true lease, leaving only a lease intended for security as applicable.

In re: Hollis, supra slip op. pp. 6-8.

Having determined that the agreements at issue are leases intended for security to which 11 U.S.C. §365 does not apply, relief from stay is still available to CTE for cause based upon a bad faith filing. In the context of a motion to dismiss based upon a bad faith filing this court has previously determined

> Such a determination of bad faith, however, is best made at the time of the hearing on confirmation of the debtor's chapter 13 plan. See, 11 U.S.C. §1324. See, also In re: Robinson, 18 B.R. 891 (Bankr. D. Conn. 1982); In re: Kosenka, 104 B.R. 40 (Bankr. N.D. Ind. 1989). The "good faith" criteria set out in Kitchens v. Georgia Railroad Bank & Trust Co., (In re: Kitchens), 702 F.2d 885 (11th Cir. 1983) can then be considered in conjunction with the confirmation criteria of 11 U.S.C. §1325 . . . 'The causes for dismissal pursuant to §1307, however, are inclusive not exclusive. . . . Clearly, if the filing of petition involves a blatant abuse of judicial process the court need not wait until the confirmation hearing to provide a remedy.' In re: Robinson, supra, at 893. However, the court in Robinson went on to note that 'dismissal of a petition for lack of good faith prior to consideration of the plan should be ordered only under extraordinary circumstances.' In re: Robinson supra at 893.

General Motors Acceptance Corporation v. Bullock, (In re: Bullock) Chapter 13 Case No. 89-11538 slip op. pp. 3-4 (Bankr. S.D. Ga. filed April 18, 1989).

From the evidence presented at hearing, CTE has demonstrated such exceptional circumstances to establish a bad faith filing of this Chapter 13 proceeding. At hearing the debtor admitted that she was experiencing financial trouble at the time she entered into the contracts with CTE. The debtor further admitted that since October, 1989 she had experienced a reduction in income

into her household to approximately One Hundred and No/100 ($100.00) Dollars per week. Under the terms of the three agreements with CTE, the debtor was committed to make weekly payments of Forty and 13/100 ($40.13) Dollars. According to the debtor's budget filed with her Chapter 13 petition she requires a minimum of Four Hundred Ninety-One and No/100 ($491.00) Dollars to meet her family living expenses not including One Hundred Seventy-Two and 56/100 ($172.56) Dollars per month required to meet the weekly payment obligations under the CTE contracts.

"Good faith" is a requirement for plan confirmation under 11 U.S.C. §1325(a)(3)[4]. This court is charged with the duty of making a case-by-case inquiry to determine whether the proposed Chapter 13 plan meets the statutory criteria of good faith. In re: Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986); In re: Steele, 34 B.R. 172 (Bankr. M.D. Ala. 1983); In re: Higginbotham, Chapter 13 Case No. 88-60192 (Bankr. S.D.Ga. March 22, 1989) (Dalis, J.) aff'd. In re: Higginbotham Case No. CV689-54 (S.D. Ga., Nov. 13, 1989) (Bowen, J.); In re: Moraetes Chapter 13 Case No. 88-11384 (Bankr. S.D. Ga. June 9, 1989) (Dalis, J.). Although a comprehensive definition of good faith

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[4]11 U.S.C. §1325(a)(3) provides

> (a) Except as provided in subsection (b), the court shall confirm a plan if - . . . (3) the plan has been proposed in good faith and not by any means forbidden by law.

is not practical, broadly speaking, the

basic inquiry should be whether under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of Chapter 13 in the proposed plan. Kitchens v. Georgia Railroad Bank & Trust Co. supra. The Kitchens decision set forth 13 factors to be considered on the question of good faith:

1. The amount of the debtor's income from all sources;
2. The living expenses of-the debtor and his dependents;
3. The amount of attorneys fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;
7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;
8. Special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack or same, in dealing with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayments; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Company, supra at 888.

In this case, the circumstances under which the debtor has contracted her debts and her demonstrated bona fides, or the lack of same in dealing with her creditors, specifically CTE, warrants a determination that this Chapter 13 plan was not proposed in good faith. From the facts presented it is apparent that the debtor sustained a reduction in income five months prior to filing for relief under Chapter 13. The reduction in income resulted in financial hardship to herself and her family which manifested itself

as early as December, 1989. On the eve of her bankruptcy filing the debtor incurred obligations with CTE which under the terms of the agreement she could not possibly have repaid based upon her income and her living expenses as set forth in her schedules filed in this case. The intent of the debtor is clear, to incur these obligations and through her Chapter 13 plan modify the terms of the agreement to extend the payback from 24 to 60 months. Accordingly, when a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith, as we do here, confirmation must be denied.

> Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.
>
> The cornerstone of the bankruptcy courts has always been the doing of equity the protection and forgiveness inherent in the bankruptcy laws surely requires conduct consistent with the concepts of basic honesty. Good faith or basic honesty is the very antithesis of attempting to circumvent a legal obligation through a technicality of the law.

<u>In re: Waldron</u>, 785 F.2d 936, 941 (11th Cir. 1986). See also, <u>Flygare v. Boulden</u>, 709 F.2d 1344, 1347 (10th Cir. 1983); <u>U.S. v. Estus</u> 695 F.2d 311, 316-317 (8th Cir., 1982); <u>In re: Rimgale</u>, 669

F.2d 426, 431-432 (7th Cir. 1982).

Having determined that this Chapter 13 petition was filed in bad faith, CTE has established a for cause basis for relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1). The request for relief from stay is ORDERED granted.

Pursuant to 11 U.S.C. §105(a) having determined that this Chapter 13 proceeding was filed in bad faith an appropriate order of dismissal shall issue.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 26th day of July, 1990.